IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-786

LAVELLE McDANNALD,
Petitioner

v.

ATTORNEY GENERAL JOHN HILL
and JUDGE HUGH GIBSON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

LAVELLE McDANNALD, *Pro Se*
P. O. Box 863
League City, Texas 77573

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

LIST OF AUTHORITIES

Cases

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. _____

LaVELLE McDANNALD,
Petitioner

v.

ATTORNEY GENERAL JOHN HILL
and JUDGE HUGH GIBSON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
and
THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS GALVESTON DIVISION

Petitioner, LaVelle McDannald, prays that the Supreme Court of the United States issue a writ of certiorari to review the United States Court of Appeals, Fifth Circuit Decision and Judgment rendered on June 6, 1978.

Petitioner also prays that a writ of certiorari issue to review the Full and Final Judgment of the United States District Court for the Southern District of Texas, Gal-

veston Division entered and executed on the 20th day of September, 1977.

OPINIONS BELOW

The United States Fifth Court of Civil Appeals affirmed the Judgment of the United States District Court by issuing a Rule 21 Summary Decision and Judgment of PER CURIAM: AFFIRMED, on June 6, 1978.

The United States District Court, Southern District of Texas, Summarily Dismissed Petitioner's Civil Rights Suit, without admitting Evidence and REFUSING Petitioner right to present her prepared Oral Argument, by Summary Judgment.

Such opinions and judgments appear at Appendix A, p. 15 and Appendix B, p. 23, respectively, infra.

JURISDICTION

The order of the Court of Appeals, Fifth Circuit, denying Petitioner's Petition for En Banc Hearing was entered on August 14, 1978. App. C, p. 24. This petition for certiorari was filed fewer than ninety days from the aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

On November 18, 1976, Lavelle McDannald, Petitioner, a United States citizen, filed a Civil Rights Suit in the United States District Court, Southern Division, Galveston, under 28 U.S.C., Sec. 1343(3) and Title 42, Sec. 1983 U.S.C., infra, against Attorney General John Hill, the Attorney General of Texas, and Judge Hugh Gibson, 56th District Court, Galveston, Texas, BOTH

United States citizens, alleging that they have violated their oath of office, arbitrarily abused their discretion and acted in concert or pursuant to conspiratorial agreement under color of State Law, to intentionally and knowingly deny Petitioner the right to show her evidence of FRAUD and illegal taxation by the City of League City, Texas, and by their separate and combined actions, have conspired under color of law to deprive Petitioner of her right to legal redress, right to a Due Process Trial, Trial by Jury, which caused to be deprived of her property WITHOUT Due Process. Petitioner requested oral hearing and filed jury demand.

The Constitutional Questions arising are:

WHETHER the actions of the United States Trial Court, in granting Summary Dismissal by their erroneous ruling that this civil action was not a federal question, WITHOUT allowing Petitioner to present her PREPARED oral testimony against dismissal in an Oral Hearing was a violation of Petitioner's constitutional right to legal redress and due process.

WHETHER the actions of the United States Trial Court in denying Petitioner the right to present her evidence of conspiracy of such state officials was a violation of Plaintiff's constitutional rights of legal redress and due process to present her grievance of PRIOR constitutional violations of Deprivation of Property without due process and legal redress.

WHETHER the Court of Appeals, Fifth Circuit, by Summary Affirmance of the Summary Dismissal of the United States Trial Court, WITHOUT granting oral hearing or Jury trial, WITHOUT allowing Petitioner the right to present her evidence of constitutional deprivations, and WITHOUT ruling on the specifically raised

constitutional violations of the United States Trial Court, FURTHER violated Petitioner's constitutional right to legal redress and due process.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, U.S. Const.: states in part "No person . . . shall be deprived of life, liberty, or property without due process of law";

Amendment VII, U.S. Const.: states in part "in suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved".

Amendment XIV, U.S. Const., Sec. 1: states in part: . . . "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 1343, U.S.C. (3): "The District court shall have original jurisdiction of any civil action authorized by law to be commenced by any person; . . . to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage of any right, privilege, or immunity secured by the Constitution of the United States, or by any act of congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . .

Title 42, Sec. 1983 U.S.C.: Civil Action for deprivation of rights. "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or caused to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF FACTS CONCERNING PETITIONER'S STATE LITIGATION

In state civil action, McDannald HAD to pay illegal taxes levied on her farm and homestead (without getting to show her evidence) by a municipality that was illegally incorporated and its Home Rule Charter WHOLLY VOID because it had violated the Texas Incorporation Statutes and the TEXAS CONSTITUTION by KNOWING and INTENTIONAL FRAUD, and therefore DID NOT HAVE THE LEGAL RIGHT TO LEVY TAXES ON HER LAND.

Judge Hugh Gibson, presiding Judge, 56th District Court, Texas, ignoring the well settled Texas Law that a private citizen may collaterally attack the existence of a municipal corporation founded in FRAUD, *City of West Lake Hills v. State,* 466 S.W.2d 722 (Tex. Sup. 1971), and ignoring the Texas law that validating statutes do not cure a fraudulent act contravening the Texas Constitution, *Richardson v. State,* 199 S.W.2d 239 (Tex. Civ. App.—citing 30 Tex. Jur. Sec. 22, P.50; *Judd v. State,* 25 Tex. Civ. App. 418, 62 S.W. 543.

Ruled, from a Pre-Trial Hearing WITHOUT SEEING McDannald's evidence of fraud, that McDannald could not present her evidence of FRAUD, because she was not joined by the Attorney General in a quo warranto proceeding, and

EVEN THOUGH requested many times by McDannald, Attorney General John Hill, who had a constitutional mandate under *Article 4, Sec. 22, TC* to instigate quo warranto proceedings IF there was sufficient cause, REFUSED to join McDannald in litigation to question the charter rights of SAID corporation, EVEN THOUGH

the Assistant Attorneys General admitted that she had "sufficient evidence".

> Article IV, Sec. 22, TC: "The Attorney General *shall* inquire into charter rights of corporations . . . and take such action in the courts . . . to prevent . . . any corporation from . . . collecting any . . . taxes . . . not authorized by law . . . and perform such other duties as may be required by law.

SUCH arbitrary abuse of discretion by Judge Gibson and John Hill being conspiracy to "Cover Up" evidence of the FRAUDULENT municipality, which operated to deny McDannald the right to show her evidence of FRAUD.

Petitioner perfected her appeal to the 14th Court of Civil Appeals, Houston, stating 5 points of error and specifically raising the 7th and 14th Amendment federal deprivations of due process. The Texas Court of Civil Appeals ruled in favor of the lower court and perfunctorially failed to rule on the points of error or address itself to the constitutional issues. The Texas Supreme Court REFUSED Writ of Error, without opinion, and the United States Supreme Court denied Petition for Writ of Certiorari, NO OPINION.

SUCH silence by the courts on the constitutional questions closed the doors to ANY consideration of a claim of denial of federal rights in McDannald's state controversy. She had to pay $18,726.52 illegal taxes, penalty and interest. Her attorney fees cost over $20,000.00. SHE DID NOT HAVE HER DAY IN COURT!

The failure of Judge Gibson to allow McDannald to show her evidence and the failure and refusal of At-

torney General John Hill to join McDannald in legal action so that she could show her evidence, and the failure and refusal of the state appellate courts and the United States Supreme Court to rule on the specifically raised United States constitutional violations obviously constitutes an unlawful judicial denial of a right to legal redress that is a judicial deprivation of due process, which caused McDannald to be deprived of her property without due process guaranteed by the 14th Amendment. *Abbott v. Tacoma Bank of Commerce,* 175 U.S. 409.

STATEMENT OF FACTS ON CIVIL RIGHTS ACTION

As a Result of McDannald's state action, where the failure of the appellate courts and the United States Supreme Court to address themselves to the constitutional issues of due process and legal redress had therefore closed the door to ANY consideration of a claim of her federal rights, Petitioner filed a federal action in the United States Trial Court, Southern Division under 28 1343 U.S.C. AGAINST the defendants, Attorney General John Hill and Judge Hugh Gibson for recovery under 42 1983 (3) U.S.C. Petitioner requested jury trial.

Defendants filed a Motion to Dismiss.

Petitioner requested and was granted an oral hearing against dismissal, BUT when Petitioner appeared for the hearing, United States District Judge Cowan advised her that he had ALREADY decided to DISMISS her cause, and gave her fifteen days to present court authorities to show WHY he should not grant Motion to Dismiss. He REFUSED to let Petitioner present her PREPARED ORAL ARGUMENT, because "she would be unduly taking up the time of the court". (App. D, p. 25).

Judge Cowan granted Petitioner ten additional days to make legal response against dismissal, but REFUSED her request to present her Response in Oral Hearing.

Petitioner FILED her legal response, and gave court authorities supporting her argument against summary dismissal, specifically raising the issue that SUCH dismissal, WITHOUT allowing Petitioner to present her oral argument, and WITHOUT seeing factual evidence on a FACT Issue would FURTHER deprive Petitioner of her constitutional rights of legal redress and due process, depriving her of her protection under 42 USC 1983.

TWO DAYS LATER, on Monday, the United States Trial Court GRANTED defendant's Motion to Dismiss by Summary Dismissal by stating in its Memorandum Opinion that Petitioner "Did not state a claim upon which relief can be granted" under 28 U.S.C. 1343; that "Judge Gibson had judicial immunity and John Hill 'probably' had official immunity". (App. A, pp. 16-22).

Petitioner perfected her appeal to the United States Court of Appeals, 5th Circuit, requesting Oral Hearing and Demanding Jury Trial, pointing out that the "reasons" for dismissal given in the Memorandum Opinion were in error and absolutely untrue, as follows:

> "The above-styled matter came on to be heard in oral argument" . . . "The Court allowed plaintiff to appear and offer oral argument" . . . and "granted petitioner a 15 day period to present Court Authorities" . . . "The fifteen-day period of time having elapsed, and plaintiff having failed to make legally satisfactory response" . . . cause is dismissed. App. A, pp. 16-17).

The "reasons" were without precedent and FALSE because the court reporters records clearly show that the cause was NOT heard in oral argument and that Petitioner was NOT allowed to present her prepared oral argument because she would "unduly be taking up the time of the Court", and that the "would be" oral hearing lasted only 7 minutes, at which the Judge informed Petitioner that he had ALREADY decided to dismiss her cause and the records show that Petitioner was given a 10 day extension by Judge Cowan, and her legal response was FILED ON TIME, with court citations AGAINST dismissal.

Under "Applicable Law", the U. S. Trial Court in their effort to show that Petitioner "Did not state a claim upon which relief can be granted", gave court citations concerning annexations, validations, etc., which are NOT federal questions, and plainly erred by ruling that Petitioner looked to the federal court to settle her STATE controversy, IGNORING the FACT that there was NO state litigation pending.

Petitioner also pointed out to the Court of Appeals that her legal response to the trial court included court authorities showing that her claim stated a cause of action upon which relief can be granted because it met the required elements sufficient to be actionable under 28 U.S.C. 1343(3) and contained the required elements necessary for recovery under 42 U.S.C. 1983, Sec. 1; and court authorities showing that the Defendants DID NOT HAVE IMMUNITY because such abuse of discretion and conspiracy to deprive Petitioner of her civil rights was so flagrant as to amount to a NON judicial function to which liability under Title 42 U.S.C. 1983 would attach.

Petitioner specifically raised the federal issue of deprivation by the United States trial court of her right to legal redress and due process by SUCH summary dismissal.

The Fifth Circuit Court of Appeals placed the above case on summary calendar and on June 6, 1978 a Rule 21 decision was rendered: Per Curiam: Affirmed as Judgment required by Rule 39. Court of Appeals DID NOT rule on the points of error and failed to address itself on the constitutional deprivations of legal redress and due process raised by Petitioner in her brief.

On August 14, 1978, hearing en banc was DENIED by the Court of Civil Appeals, Fifth Circuit.

REASONS FOR GRANTING WRIT

It is submitted that the Fifth Circuit Court of Civil Appeals erred by affirming the judgment of the United States Trial Court dismissing Petitioner's civil rights suit for "Failure to state a claim upon which relief can be granted" because Petitioner's complaint DID allege a cause of action against the defendants, who under state law, arbitrarily abused their discretion, and acted in conspiratorial agreement to intentionally prevent Petitioner from showing her evidence of FRAUD. SUCH actions and abuse of discretion obviously constituted STATE action which deprived Petitioner of her 14th Amendment rights of legal redress, trial by jury, and due process, which caused her to be deprived of her property without due process, and WAS A VIOLATION OF PETITIONER'S RIGHTS AS PER 42 U.S.C. 1983, Sec. 1. Civil Rights Act of 1871, and is CLEARLY UNDER THE LAW OF THIS CIRCUIT AND OF THE UNITED STATES.

The Fifth Circuit Court of Appeals, by summary affirmance without opinion, and by ignoring the points of error presented by Petitioner, ERRONEOUSLY let stand the summary judgment and opinion of the trial court, which prevented Petitioner from putting on her proof that the Defendants HAVE NO IMMUNITY, because SUCH arbitrary abuse of discretion, and intentional conspiracy to deprive Petitioner of her civil rights by John Hill and Judge Gibson was so flagrant as to amount to a NON JUDICIAL FUNCTION to which liability under 42 U.S.C. 1983 would attach.

This case should not be held insufficient, and THIS WRIT SHOULD NOT BE DENIED for the reason of the Eleventh Amendment immunity for Judge Gibson or Attorney General John Hill, because neither *Pierson v. Ray,* 386 U.S. 547 (1967) nor *Scheur v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683 (1974) recognizes any so-called absolute immunity for judges or executive officers, as the "Eleventh Amendment provides no shield for such officials when they are confronted by a claim that they deprived another of a federal right under the color of state law."

Judge Gibson and Attorney General John Hill DO NOT HAVE JUDICIAL IMMUNITY because such intentional and knowing abuse of discretion and conspiracy to deprive Petitioner of her civil rights was so flagrant as to amount to a NON judicial function. Judge Gibson does not have immunity because in *Ex Parte Virginia,* 100 U.S. 339, 25 L.Ed. 676, it was ruled that "to have immunity, a judge must be performing a judicial function" and "when a judge acts intentionally and knowingly to deprive a person of his constitutional rights, which

is WHOLLY incompatible with judicial function, he acts no longer as a judge, but as a 'minister' of his own prejudices," and "A judge is liable for injury caused by a ministerial act."

In *Briggs v. Goodwin,* 46 L.W. 2179 (Civ. App. D.C. 9/21/77), it was ruled that "perjury is not within a prosecutors authority, and that therefore Goodwin, a prosecutor can not be immune for acting WHOLLY outside his authority."

Attorney General John Hill CERTAINLY has no judicial immunity because in *Monroe v. Pape,* 365 U.S. 167 (1973), Mr. Justice Douglas, writing for the court, held that 42 U.S.C. 1983 was meant "to give a remedy to parties deprived of constitutional rights . . . and when a person claims a deprivation of federal rights by the defendants, under color of state law . . . their claims are not barred by the Eleventh Amendment." *Scheur v. Rhodes, supra* and in *Ex parte Young,* 209 U.S. 123 (1908) "it has been settled that the Eleventh Amendment provides NO shield for a state official confronted by a claim that he had deprived another of a federal right." A recent Supreme Court case, *Earl L. Butz, et al v. Economon, et al,* 46 U.S.L.W. 4952 (June 27, 1978) the Court held that a government official can be held liable when he deprives a person of their federal right.

The federal courts herein, by rendering Summary DISMISSAL and Judgment, WITHOUT seeing FACTUAL evidence, by REFUSING to let Petitioner present her prepared Oral Argument, and by their REFUSAL to grant a hearing by the full court, have surrendered their responsibility to see IF the law has been violated, and

have FAILED in their REPONSIBILITY to protect Petitioner's rights under the United States Constitution. They have erred by rendering summary judgment because "conspiracy to deprive Petitioner of her civil rights raises genuine FACT issue," and "district court must deny motions for summary judgment after finding genuine factual issue dispute even if it is convinced that party opposing the motion is unlikely to prevail at trial. *Hughes v. American Jawa, Ltd.,* 529 F.2d 21 (C.A. Mo. 1976), and "in determining whether summary judgment is appropriate, the Court must look at the record . . . in the light most favorable . . . to the party opposing the motion . . ."; *Hahn v. Sargent,* 523 F.2d 461; *Poller v. Columbia Broadcasting System,* 360 U.S. 473 (1962). ". . . the intermediate court plainly errs when it affirms without considering a contention that might lead to a reversal . . ." *McKelvy v. Barger,* 381 S.W.2d 59 (1964).

The Fifth Circuit Court of Appeals, by failing to address itself to Petitioner's constitutional issue of due process closed the door to ANY consideration of a claim of a federal right. *Young v. Ragan,* 337 U.S. 235; *Henry v. State of Mississippi,* 379 U.S. 415. SUCH failure and refusal obviously constitutes an improper judicial denial of a right to legal redress and due process of the 14th Amendment and the Civil Rights Code, 42 U.S.C. 1983. *Abbott v. Tacoma Bank of Commerce, supra.* "Such bar to the assertion of a federal question is in itself a federal question for this court to pass on." *Douglas v. State of Alabama,* 357 U.S. 449; *NAACP v. State of Alabama,* 357 U.S. 449.

Since the judgment of affirmance by the Court of Civil Appeals is without fair and adequate support, it

therefore calls for a review by this Court. *N.A.A.C.P. v. State of Alabama, supra.*

CONCLUSION

"It is monstrous that courts should aid or abet the law breaking officer. It is the abiding truth that nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence, the Constitution. . . ." Justice William J. Brennan.

For these reasons, so that justice may prevail, a Writ of Certiorari should issue to review the orders of the Court of Civil Appeals, Fifth Circuit and Orders of the United States District Trial Court.

Petitioner respectfully prays that this case be remanded, in whole or in part, in respect to each Defendant, individually for a full and fair trial on the merits of the case.

Respectfully submitted,

LaVELLE McDANNALD, *Pro Se*
P. O. Box 863
League City, Texas 77573
or
P. O. Box 802
Fort Davis, Texas 79734

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION

No. 76-G-121

LaVELLE McDANNALD,
Plaintiff

v.

ATTORNEY GENERAL JOHN HILL,
and JUDGE HUGH GIBSON,
Defendants

FULL AND FINAL JUDGMENT

For the reasons stated in the Memorandum Opinion of even date herewith, Judgment is entered for all defendants and this cause is dismissed with prejudice at plaintiff's cost. This is a final judgment.

ENTERED and EXECUTED at Galveston, Texas, this the 20th day of September, 1977.

/s/ FINIS E. COWAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

CIVIL ACTION

No. 76-G-121

LaVELLE McDANNALD,
Plaintiff

v.

ATTORNEY GENERAL JOHN HILL,
and JUDGE HUGH GIBSON,
Defendants

MEMORANDUM OPINION

LaVelle McDannald, pro se
P. O. Box 863, League City, Tx

For Attorney General John Hill
David M. Kendall, First Asst. Attorney General
P. O. Box 12548, Capitol Station, Austin, Tx

For Judge Hugh Gibson
William D. Decker
504 First Hutchings-Sealy Nat'l Bank Bldg.
Galveston, Tx

The above-styled matter came on to be heard in oral argument in connection with defendant's Motion to Dismiss the plaintiff's complaint for failure to state a claim upon which relief could be granted. The Court allowed plaintiff to appear and offer oral argument in support of her position and in opposition to the defendants' Motion to Dismiss, and granted to plaintiff a fifteen-

day period of time in which to obtain counsel or demonstrate to the Court why the authorities cited below do not control this matter.

The fifteen-day period of time having elapsed, and plaintiff having failed to make legally satisfactory response, the motions of defendants are GRANTED and the above-styled cause is DISMISSED with prejudice, with costs assessed against the plaintiff.

FACTUAL BACKGROUND

For purposes of this motion, the Court accepts as true all of the allegations of the plaintiff's complaint. These allegations reveal that the defendant Hugh Gibson is the Judge of the 56th District Court of Galveston County, Texas, who allegedly rendered a summary judgment against the plaintiff in a litigated matter, and that the defendant John Hill is the Attorney General of the State of Texas who declined to institute a quo warranto proceeding at the request of the plaintiff.

This controversy arises from a hotly contested incorporation election occurring on December 7, 1961. A total of 386 citizens of the area which became the City of League City voted for incorporation, and 201 voted against. Thereafter, League City was duly certified under the laws of the State of Texas as a Home Rule city on May 3, 1962.

Thereafter, for a ten-year period, plaintiff instituted no legal action to challenge the validity of the incorporation, failed to follow the procedure prescribed in Art. 1051, Texas Revised Civil Statutes, which sets forth a procedure by which a person living within an incorpor-

ated town or village may challenge the tax assessment of his property before the Board of Equalization. In addition, during this ten-year period of time, while the plaintiff was simply refusing to pay taxes and taking no action whatsoever to assert or protect any legal rights which she may have had, the Legislature of the State of Texas on three separate occasions passed validating statutes, validating the incorporation of cities such as League City, which had previously been incorporated. See: Arts. 974D-10, 947D-11, 974D-33, V.A.T.S. Under the laws of the State of Texas, such validating acts have the effect of validating annexations by a city, even though totally void ab inititio. *City of Grand Prairie v. Turner,* 519 S.W.2d 19 (Tex. Civ. App.-Dallas 1974, error ref'd, n.r.e.) and *State v. City of Hurst,* 515 S.W.2d 698 (Tex. Civ. App.-Fort Worth 1975, error ref'd, n.r.e.)

During the ten-year period of time after the annexation, plaintiff was not devoid of legal remedies. If she wished to complain of the manner in which her property was assessed for taxation, a procedure existed under Art. 1051, Texas Revised Civil Statutes, whereby she was legally entitled to challenge the fairness of her assessment. In addition, the Supreme Court of Texas, in *City of West Lake Hills v. City of Austin,* 466 S.W.2d 722, (Tex. 1971) has said:

> "It is well established that private parties who are directly affected may collaterally attack a void incorporation or annexation. *Walling v. North Central Texas Municipal Water Authority,* 162 Tex. 527, 348 S.W.2d 532 (1961); *City of Corsicana v. Willmann,* 147 Tex. 377, 216 S.W.2d 175 (1949); *Parks v. West,* 102 Tex. 11, 111 S.W. 726 (1908). . . ."

Only after suit was instituted by League City for the purpose of collecting ten years of back taxes, did the plaintiff take any legally cognizable action to challenge the validity of the annexation. By 1971, rights had vested. This Court takes judicial knowledge of the fact that during the interim, the vast majority of the tax payers of League City had relied upon the validity of the incorporation by paying taxes. The plaintiff's complaint indicates that during this period of time, League City had issued bonds, which had been sold. During the ten years in which plaintiff failed to take legal action but merely refused to pay taxes, rights had vested, and numerous parties had relied extensively upon the validity of the incorporation of the City of League City.

Plaintiff herein defended the tax suit by the City of League City vigorously, and ultimately Judge Hugh Gibson granted the City of League City's motion for summary judgment, which was affirmed by the Court of Civil Appeals and the Supreme Court of Texas. Review of the concise, thoughtful opinion of Chief Justice Tunks of the Houston Court of Civil Appeals reveals the propriety of Judge Gibson's action in granting the summary judgment. See: *Cleves McDannald, Appellant v. League City, Appellee,* 528 S.W.2d 880 (Tex. Civ. App.—Houston [14th dist.] 1975, error ref'd n.r.e.). The state courts have the duty—just as does this Court—to protect the plaintiff's constitutional rights. Chief Justice Tunks' published opinion reveals conclusively that defendant, The Honorable Hugh Gibson, very carefully and conscientiously protected all of the plaintiff's rights under the Constitutions of the United States and the State of Texas.

Defendants here have filed motions to dismiss the complaint on the grounds that the complaint does not state a claim upon which relief can be granted.

APPLICABLE LAW

Plaintiff, having failed in her state court litigation now alleges that this Court has jurisdiction over this controversy by virtue of 28 U.S.C. § 1343(3), which says that:

> "The district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) to redress the deprivation, under color of state law, statute, ordinance, regulation, custom or usage of any right, privilege, or immunity secured by the Constitution of the United States, or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . ."

It is well established that 28 U.S.C. § 1343 does not abrogate the doctrine of judicial immunity. *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Littleton v. Fisher*, 530 F.2d 691 (6th Cir. 1975). Justice Gibson's motion to dismiss is thus valid on the basis of the doctrine of judicial immunity; however, even if it were not for the doctrine of judicial immunity, the plaintiff's complaint, as will be discussed in more detail below, fails to state a claim upon which relief can be granted. The claim against Attorney General Hill is probably also barred by the doctrine of official immunity. See: *Wood v. Strickland*, 420 U.S. 308 (1975) and *Wilhelm v. Turner*, 431 F.2d 117 (8th Cir. 1970); but even if the doctrine of judicial immunity

were not applicable to Attorney General Hill, it is well established that his obligation to institute a quo warranto proceeding is a matter which lies entirely within his discretion. See: Art. 6253, V.A.T.S. The Court holds that the Attorney General's action in declining to institute a quo warranto proceeding here did not, as a matter of law, deprive this plaintiff of any constitutionally protected right and that plaintiff had no right to insist upon the institution of a quo warranto proceeding.

Even if it were not for the doctrine of judicial immunity, plaintiff's complaint here clearly, under the law of this Circuit and of the United States, fails to state a complaint upon which relief may be granted. In *Hammonds v. City of Corpus Christi*, 226 F.Supp. 456 (S.D. Tex. 1964), Judge Garza, now the Chief Judge of the Southern District of Texas, dismissed a suit challenging an annexation, holding that the annexation of lands to a city is a purely political matter, entirely within the power of the State Legislature to regulate, and that no federal question was presented. This decision was affirmed by Circuit Judge Hutcheson in *Hammonds v. City of Corpus Christi*, 343 F.2d 162 (5th Cir. 1965), and is consistent with the law as enunciated in *Deane Hill Country Club, Inc. v. City of Knoxville*, 379 F.2d 321 (6th Cir. 1967) and *Adams v. City of Colorado Springs*, 308 F.Supp. 1397 (D.C. Colo. 1970)—affirmed by the Supreme Court of the United States at 399 U.S. 901 (1970).

CONCLUSION

Plaintiff's complaint here set out her alleged grievance in great and intricate factual detail. Accepting as true

every allegation contained therein, it does not state a claim upon which relief can be granted. Defendants' motion to dismiss is GRANTED and judgment entered that plaintiff's cause be in all things DISMISSED at plaintiff's cost.

ENTERED AND EXECUTED at Galveston, Texas, this the 20th day of September, 1977.

/s/ FINIS E. COWAN
Judge

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-3283

Summary Calendar*

LaVELLE McDANNALD,
Plaintiff-Appellant,

versus

JOHN HILL, Attorney General and
HUGH GIBSON, Judge
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

---

(June 6, 1978)

BEFORE GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

APPENDIX C

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

Edward W. Wadsworth
Clerk

600 Camp Street
New Orleans, La. 70130
Tel. 504-589-6514

August 14, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-3283 — LAVELLE McDANNALD v. JOHN HILL, ETC., ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing;* and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ BRENDA M. HAUCK
Deputy Clerk

* on behalf of appellant. McDannald.
bmh

cc: Ms. LaVelle McDannald
Mr. David M. Kendall
Mr. James R. Ansell

APPENDIX D

THE COURT: Do you have any other arguments that you would like to offer, Mrs. McDannald, about the immunity or about any other aspect of the case?

MRS. McDANNALD: I can't give my whole statement that I have prepared?

THE COURT: If it repeats the material that you have already set forth in your pleadings I think you would be unduly taking up the time of the Court because I have read that very carefully.

But if you wish to make a statement, go right ahead.

MRS. McDANNALD: It's quite lengthy, but I will try to be as brief as possible.

THE COURT: Thank you, ma'am.

MRS. McDANNALD: First of all, I am a natural born United States citizen, and I make no claim to the dignity of a law degree or of being a judge, and I do not know the rules and regulations of this Court.

THE COURT: Excuse me for interrupting. Let me make sure I understand one thing very clearly from the pleadings that you filed here.

My understanding from the complaint . . .

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-786

* * *

LA VELLE MC DANNALD,

Petitioner

V.

ATTORNEY GENERAL JOHN HILL and
JUDGE HUGH GIBSON,

Respondents

* * *

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * *

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
A/C 512 475-5861

JAMES R. ANSELL
Assistant County Attorney

2001 Ball
Galveston, Texas 77550
A/C 713 762-8621, Ext. 343

Attorneys For Respondents

SUBJECT INDEX

INDEX OF AUTHORITIES

CASES:

RULES:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 78-786

* * *

LA VELLE MC DANNALD,

Petitioner

V.

ATTORNEY GENERAL JOHN HILL and
JUDGE HUGH GIBSON,

Respondents

* * *

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

* * *

Respondents John Hill, Attorney General of the State of Texas, and Hugh Gibson, Judge of the 56th Judicial District Court of Galveston County, Texas, file this brief in opposition to the petition for a writ of certiorari.

OPINIONS BELOW

The memorandum opinion of the United States District Court granting Respondents' motion to dismiss and dismissing Petitioner's asserted cause of action is reported at 438 F. Supp. 785.

The affirmation of that decision by the United States Court of Appeals, without opinion, is reported at 575 F.2d 880.

THE "QUESTIONS PRESENTED" FOUND IN THE PETITION DO NOT COMPLY WITH THE MANDATE OF RULE 23(1)(c) OF THE SUPREME COURT RULES

To Respondents it would seem that the only issues which conceivably could be before this Court would be:

(1) Whether the United States District Court erred in sustaining a motion to dismiss filed under Rule 12(b)(1) and (6) in a suit for damages brought against the Attorney General of the State of Texas alleging that, as a result of a conspiracy, he refused to join Petitioner in filing an action in the nature of *quo warranto* to challenge the incorporation of a municipality some twelve years earlier.

(2) Whether the United States District Court erred in sustaining a motion to dismiss under Rule 12(b)(1) and (6) in a suit for damages brought against a district judge of the State of Texas alleging that, as a result of a conspiracy, he had sustained a motion for summary judgment against Petitioner in a lawsuit whereby Petitioner sought to challenge the incorporation of a municipality some ten or more years earlier.

STATEMENT OF THE CASE

The following facts are taken primarily from Plaintiff's pleadings in the federal courts supplemented, to some extent, by the published decisions involved.

The City of League City was incorporated in Texas as the result of an election held on December 9, 1961. It was certified under the state statutes as a Home Rule city on May 3, 1962. In 1971 or thereabouts the city sued Petitioner's husband, Cleaves McDannald, for delinquent ad valorem taxes. Mr. McDannald filed a counterclaim asserting that the assessment and collection of the taxes were illegal because of the fraudulent incorporation of the city. The city countered

with a plea in bar alleging that the counterclaim presented a collateral attack on the validity of the municipal incorporation which could be maintained only by the state in a *quo warranto* proceeding and also that the incorporation had been validated by Act of the Texas Legislature.

This matter came before Respondent Gibson in his capacity as district judge and he sustained the plea in bar and entered judgment against McDannald for taxes, penalty and interest.

Mr. McDannald appealed, in which appeal he was represented, among others, by a former United States Attorney for the Southern District of Texas and a former Attorney General of the State of Texas who, in addition, had served on the Supreme Court of Texas. In the appeal the judgment of the trial court was affirmed by the Court of Civil Appeals [528 S.W.2d 880 (Tex.Civ.App.--Houston [14th Dist.] (1975)] and the Supreme Court of Texas refused to grant a writ of error with the notation that there was no reversible error. This Court denied petition for writ of certiorari on October 4, 1976. 97 S. Ct. 162.

This suit was then filed on November 8, 1976 complaining of Attorney General John Hill and Judge Gibson, the complaint as to the former being that he had refused the request of Mrs. LaVelle McDannald that he join her in a *quo warranto* action. Parenthetically, the complaint also lists requests to Attorney General Crawford Martin, who was Attorney General Hill's predecessor, Attorney General Hill having taken office on January 1, 1973. As to Judge Gibson, the complaint alleges that on February 7, 1975 he entered a final judgment without hearing evidence.

Respondents filed a joint motion to dismiss asserting lack of jurisdiction of the subject matter and that the

complaint failed to state a claim upon which relief might be granted. On September 20, 1977 the motion was granted and a full and final judgment entered for Defendants dismissing Petitioner's cause with prejudice. It is from that order that this appeal has been taken and it is the propriety of that order which is at issue.

NO REASON EXISTS FOR GRANTING THE WRIT

Whether the petition states reasons which would warrant this Court assuming jurisdiction would seem to be governed, to some extent, by Rule 19(1)(b) of the Supreme Court Rules. Certainly the decision of the Court of Appeals is not in conflict with the decision of any other Court of Appeals and Petitioner has pointed to no conflict. Nor has the Court of Appeals decided an important state or territorial question in a way in conflict with applicable state or territorial law. It has not decided an important question of federal law which has not been, but should be, settled by this Court. Nor has it decided a federal question in a way in conflict with applicable decisions of the Supreme Court. Finally, it does not appear that the Court of Appeals has "so far departed" from accepted and usual judicial precedents as to call for an exercise of this Court's power of supervision.

Quite to the contrary, the decision of the district court, affirmed by the Court of Appeals, faithfully follows the precedents of this Court from *Bradley v. Fisher*, 13 Wall. 335 (1872) to *Stump v. Sparkman*, 98 S.Ct. 1099 (1978), as to Judge Gibson, and *Imbler v. Pachtman*, 424 U.S. 904 (1976), as to Attorney General Hill. The doctrine of judicial immunity, with its application to prosecutorial officials, is so well established that surely it cannot be questioned in this Court and it applies even though it may be alleged that the acts were done maliciously or corruptly.

None of the allegations of Mrs. McDannald, as Petitioner, show action by either of the Respondents in the clear absence of jurisdiction. To the contrary, their actions were clearly *within* their jurisdiction and thus were acts for which they are immune from actions for damages.

For the foregoing reasons, Respondents respectfully submit that the petition for a writ of certiorari should be in all things denied.

Respectfully submitted,

JAMES R. ANSELL
Assistant County Attorney
2001 Ball
Galveston, Texas 77550
A/C 713 762-8621, Ext. 343

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
A/C 512 475-5861

Attorneys For Respondents

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Brief in Opposition to Petition for Certiorari has been placed, postage prepaid, in the United States First Class Mail on this the ___ day of December, 1978 addressed to Mrs. LaVelle McDannald, Pro se, P.O. Box 863, League City, Texas, 77573.

_____

DAVID M. KENDALL